IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-232

THOMAS LIPUMA,

Petitioner,

against

COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF NEW YORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO CERTIORARI

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Opinions Below

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, —— F. 2d ——, Docket No. 77-2006, Slip Op. at 4657 (July 11, 1977)* reversing an order of the United

* The Second Circuit's opinion is reproduced in petitioner's Appendix A, referred to herein in parentheses accompanied by small letters.

States District Court for the Southern District of New York granting a petition for a writ of habeas corpus unless within sixty days the New York state courts permitted petitioner to make a motion to suppress evidence.

The District Court issued two orders, dated September 24, 1976 and October 19, 1976, respectively and reproduced in *U.S. ex rel. Nancy Rosner on behalf of Thomas LiPuma* v. *Commissioner, New York State Department of Corrections,* 421 F. Supp. 781 (S.D.N.Y. 1976).

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Constitution of the United States provides in pertinent part:

> Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .
>
> Amendment VI: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Statutes Involved

Section 710.40, New York Criminal Procedure Law, provided in pertinent part:

> "1. A motion to suppress evidence . . . must be made . . . prior to trial.
>
> 2. The motion may be made for the first time during trial when, owing to previous unawareness of facts

> constituting the basis thereof or to other facts, the defendant did not have reasonable opportunity to make the motion before trial."

Questions Presented

1. Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, may a state prisoner be granted federal habeas corpus relief on the ground that evidence in an allegedly unconstitutional search and seizure was introduced at trial?

2. Did petitioner waive his claim for purposes of federal habeas corpus review by failing to make a timely motion to suppress required by New York statute?

3. Was petitioner deprived of assistance of counsel because his lawyer failed to make a timely motion to suppress evidence even though petitioner's guilt was established beyond a reasonable doubt by positive in-court identification; the motion to suppress was of doubtful merit and counsel chose a different strategy as to the evidence; and petitioner's representation was otherwise forceful and effective?

4. Is there a conflict in federal circuits interpreting *Wainwright* v. *Sykes*?

5. Does the decision of the United States Court of Appeals for the Second Circuit, which is fully consistent with prior decisions of this Court, present any substantial federal question which warrants the exercise of this Court's jurisdiction?

Statement of the Case

Summary

On the night of January 10, 1972, Mr. & Mrs. Raymond Geibel returned to their suite in Manhattan's Berkshire Hotel to find petitioner LiPuma at the desk of the sitting room. Mrs. Geibel asked LiPuma to identify himself, and he replied that he was a hotel security officer investigating several reported burglaries in the hotel. Two more strangers emerged from the Geibel's bedroom, likewise claiming to be security men. Mr. Geibel asked the three men for identification. They replied that they did not have any with them and departed, leaving the Geibel's rooms in disarray. Mr. Geibel reported the incident to hotel authorities.

During the same evening, Mr. & Mrs. William Robinson returned to their suite in the Berkshire Hotel, finding it quite disturbed. Two fur coats, a leopard skin and a mink, some jewelry, including a diamond ring and gold cufflinks, and a pin were missing. Similarly, the Robinsons reported the incident.

Responding to a call from the hotel, police officers Robert Newham and John DeBona went to the Geibel's room. Obtaining a description of the three intruders, the two officers, joined by Detective William Donnelly, Patrolman Richard Powers, Patrolman James Greene and other officers searched the hallways and corridors. Next, Officers Donnelly, Powers, and Greene were directed by a superior to check out rooms 612 and 613.*

Reaching room 613, Detective Donnelly knocked, saying that it was the police and that "there had been a number of burglaries in the hotel and that we thought either this room

* Only the rooms on the sixth floor were used for transients. The other rooms were leased by long-term tenants.

was burglarized or possibly could be burglarized" and asked "could we come in." Patrolman Greene, standing next to Donnelly, heard "Yes" in response. The door was opened by James Doyle, whom Greene recalls telling Donnelly that it was "all right for him to come in and check the security of the premises", but not search him.

Inside the room, Donnelly noticed Doyle looking nervously toward the closet. Donnelly opened the door of the closet, saw a human hand on the shelf. Donnelly closed the door, saying "there's nothing there" and then motioned to his partners. The officers drew their weapons and ordered the closet's occupant to "come out with your hands up." Petitioner LiPuma then walked out of the closet, but the hand on the shelf remained. The command was repeated and Peter Raimondo came forth.

James Doyle denied any knowledge of the men in the closet, but the three were arrested. Doyle's hotel-room statement that he did not know petitioner LiPuma was later contradicted by Joyce Gersh, Doyle's girl friend who had seen Doyle with LiPuma and Raimondo on many occasions before the date of the robberies.

The pillbox taken in the Geible break-in was found in Raimondo's pocket, together with the cufflinks taken from the Robinsons. On the bed in the room, the officers found a half-open attaché case containing the pin and the mink and leopard skins taken from the Robinson's room.

About an hour after the arrest, Helen Geibel identified LiPuma as one of the three intruders at a lineup in the police station. Mrs. Geibel also identified LiPuma at trial, "As soon as I saw him I could identify him. I never would forget that face."

LiPuma, Raimondo and Doyle were indicted on two counts of second degree burglary, petit and grand larceny, and two counts of criminal possession of stolen property—relating to the thefts in the Geibel room and in the Robin-

son room. Raimondo and Doyle pleaded guilty to reduced charges. LiPuma went to trial, where he was convicted of burglary in the second degree and petit larceny in connection with the Geibel burglary.

Petitioner LiPuma maintains before this Court that his Fourth Amendment rights were violated when the trial court refused to entertain a mid-trial motion to suppress all evidence derived from the January 10, 1972 search of room 613 at the Berkshire Hotel where he and Raimondo had been discovered in the closet, as well as where the physical evidence was found. Further, he maintains that his counsel's failure to make a timely motion to suppress, pursuant to New York Criminal Procedure Law § 710.40, deprived him of effective assistance of counsel. To properly evaluate petitioner's contentions, it is necessary to examine the efforts of defense counsel and the circumstances of the failure to make a timely motion to suppress.

The Defense

The defense hired John McNally, a private investigator, who interviewed Mrs. Geibel in Phoenix, Arizona. He testified that she told him that "the facts had left her and that she thought that the tallest of the three intruders was not at the Geibel's desk."* At trial, called as a defense witness, Mrs. Geibel reported that she admitted telling McNally that she was not sure, after a two and one-half year gap between the burglary and the interview, that she could identify LiPuma. However, she once again stated in open court, "his whole face came back to me" and that she was sure of LiPuma's identity as one of the robbers.

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* LiPuma was the tallest of the three. Mrs. Geibel told McNally that she was positive of the identity of the man whom she had identified at the lineup.

James Doyle testified that LiPuma had been with him coincidentally earlier in the afternoon of the robbery and had visited him in his room later that evening. LiPuma, he said, had nothing to do with the robbery. He also stated, on cross-examination, that when the police came to his room, they "just barged in."

In addition to the above testimony,* petitioner's counsel, instead of showing incompetence, expended great efforts on behalf of LiPuma. Defense counsel made discovery motions to inspect the grand jury minutes and to dismiss the indictment. Defense was successful in obtaining a dismissal of four counts of a six count indictment and the exclusion of evidence relating to the Robinson robbery. Defense counsel interviewed arresting police officers before trial.

In the habeas corpus evidentiary hearing in the district court, defense counsel professed negligence and oversight for not moving to suppress before the state trial court. The attorneys maintained then and now that the motion to suppress was meritorious. Actually, at the outset of trial, the court inquired whether any pre-trial motions were pending, and counsel replied that the *only* such matter was a motion to suppress Mrs. Geibel's identification of LiPuma at a lineup. A hearing was held on this motion, which was then denied. Only after several of the People's witnesses had testified did counsel state that a motion to suppress physical evidence had been made on behalf of one of the codefendants and had also been joined in by LiPuma. An associate of defense counsel Coiro then indicated that he had orally joined in this motion when it was pending before another judge.

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* Most of McNally's interview with Mrs. Geibel had been recorded and played to the jury. Defense counsel did a creditable job at trial—thoroughly hammering home the main defense that no evidence could be connected to petitioner and that he was a victim of mistaken identity. Their cross-examination of Mrs. Geibel was especially thorough and comprehensive.

Throughout the remainder of the trial, Justice Fraiman made exhaustive inquiries attempting to clarify the situation. He found that neither in the recollection of the court before whom the motion was allegedly made, nor in the recollection of the assistant district attorney was such a motion made—nor was such a motion in the official transcript or in writing. Also, because the "facts which could have formed the basis for such motion were readily available to defendant prior to trial," the court declined to entertain the motion. Later, during sentencing, LiPuma asked for a hearing to prove that counsel had told him that he was moving to suppress physical evidence; the application was denied.

It should be noted that counsel had objected to the admission of the pillbox on the ground that it had never been connected to the petitioner, and it was admitted "subject to connection". Counsel did not mention that the pillbox was unlawfully seized. And counsel's motion to dismiss the indictment was largely based on the People's failure to prove petitioner had possessed the Geibel pillbox, or evidence relating to the Robinson burglary. It is thus apparent that defense counsel did not then believe that they had a meritorious motion to suppress. In fact, petitioner's first counsel admitted that the chance of success on the motion might be "tough". Subsequent defense counsel stated that there might be a "problem" in proving the motion. Trial defense counsel agreed that the motion would be "illfated." The assistant district attorney said he and the defense counsel had thought the motion "inappropriate."

The trial court noted that the failure to make the motion to suppress was not as significant as it would appear to defense counsel.

Reasons for Denying the Petition for Certiorari

The decision of the United States Court of Appeals is entirely consistent with the decisions of this Court and presents no substantial federal question which warrants review by this Court.

A.

In *Stone* v. *Powell,* 428 U.S. 465 (1976), this Court repeatedly held that habeas relief may not be afforded to a state petitioner who has had an *opportunity* for full and fair litigation of his Fourth Amendment claim. Petitioner argues that since the trial court did not reach the merits of his mid-trial suppression motion, he was denied such an opportunity. However, he confuses actual litigation with the opportunity to litigate.

In *Stone,* this Court decided that the purpose of the exclusionary rule, deterrence, was too minimal a concern to support its application in a federal collateral proceeding. 428 U.S. at 486-488. This reasoning is unaffected by whether a petitioner litigated his claim or merely had the opportunity to litigate, which he forewent, regardless of the reason. See *Gates* v. *Henderson,* —— F. 2d —— (2d Cir. August 19, 1977) (Slip Op. 5361) (*en banc*). Although petitioner attempts to make out a Sixth Amendment ineffectiveness of counsel claim, the Court of Appeals clearly recognized that "at the heart of this case lies an alleged Fourth Amendment violation." (19a n. 6).

LiPuma had the opportunity to raise his search and seizure claim pretrial, which he failed to do, or during trial, which he did and lost.

Further, as the Second Circuit stated, LiPuma's counsel developed all the facts irrelevant to the Fourth Amendment claim at trial (20a n. 6). Since the trial testimony was part of the record on petitioner's direct appeal, the

substance could have been presented to the state appellate courts.*

Although *Stone* is dispositive, petitioner invokes the holding of *Williams* v. *Georgia,* 349 U.S. 375 (1955). *Williams* states at 25, "A state court may not, in the exercise of its *discretion,* decline to entertain a constitutional claim [pursuant to a state procedural rule] while passing upon kindred issues raised in the same manner" (Emphasis added). Petitioner maintains that § 710.40, New York Criminal Procedure Law ("NYCPL"), which requires motions to suppress evidence be made prior to trial, was improperly imposed to defeat an obviously meritorious federal claim.

Petitioner makes two false interpretations. First, he views § 710.40 as discretionary. Second, he views his claim as "obviously" meritorious. These points are disputed by the facts and law, as is discussed in the careful and well-reasoned opinion of the Second Circuit (9a-12a).

Section 710.40 provides an exception when, "owing to previous unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion before trial." This exception is totally inapplicable herein. Petitioner's counsel fully developed his Fourth Amendment claim at trial in the strategic manner he chose. Also, immediately preceding the commencement of trial, the state trial judge asked Attorney Coiro if "there was any outstanding motion" he required. Coiro replied "that there were not," § 710.40 was not subject to discretionary application. An exception to its prohibition was not present.

United States ex rel. Tarallo v. *LaVallee,* 433 F. 2d 4 (2d Cir. 1970), *cert. denied* 403 U.S. 919 (1971), forecloses re-

* Petitioner's conviction was affirmed without opinion by the Appellate Division, First Department, and leave to appeal to the New York Court of Appeals was denied.

view (as does *Stone, supra*). In *Tarallo,* failure to comply with § 813-d of New York Code of Criminal Procedure, § 710.40's predecessor, foreclosed federal habeas corpus relief.* As the Second Circuit points out, after LiPuma's trial New York enacted NYCPL § 255.20, dealing with general procedure on all pretrial motions. It states that the court "in the interest of justice and for good cause shown, may, *in its discretion, at any time before sentence,* entertain and dispose of the [pre-trial] motion on the merits" (11a-12a; emphasis added). The passage of § 255.20 supports the view that there was the prior lack of discretion to hear a suppression motion not made prior to trial.

The facts herein, as set forth in the Statement of the Case, *supra,* and in the Second Circuit's opinion, cannot support petitioner's contention that his claim was "obviously meritorious."

B.

Petitioner mistakenly places reliance on *Wainwright* v. *Sykes,* —— U.S. ——, 45 U.S.L.W. 4807 (June 23, 1977) for his claim for relief.

Wainwright, recognizing the Court's willingness to modify its earlier views of the writ, overturned the deliberate bypass rule of *Fay* v. *Noia,* 372 U.S. 391 (1963), and applied the rule of *Francis* v. *Henderson,* 425 U.S. 536 (1976), barring habeas corpus review absent a showing of cause for non-compliance and of actual prejudice resulting from a constitutional violation, in cases of procedurally waived objections to the admission of a confession at trial.

At p. 4813, the Court in *Wainwright* concludes, "the other evidence of guilt presented at trial, moreover, was

* The Circuit Court observes at 11a, "A comparison of § 813-d of the Code of Criminal Procedure (reproduced at 433 F. 2d at 7, n. 4) with NYCPL § 710.40 as it stood in May of 1974 (the time of LiPuma's trial—§ 710.40 was thereafter amended twice, on September 1, 1974 and September 1, 1976) reveals little if anything by way of substantive difference between the two provisions."

substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent . . ." As the Second Circuit states, the "facts and testimony make clear that petitioner's suppression motion was not sufficiently supported" (18a). See Statement of Facts, *supra*. Petitioner points to the district court finding of evidence "sufficiently weighty so that its exclusion from the case was not harmless beyond a reasonable doubt." The Second Circuit disposes of this ill-founded argument (16a-20a), observing that the use of a "beyond a reasonable doubt standard" "confuses a measure of proof imposed upon the prosecution in establishing the element of a crime where the issue before the trier of fact is the guilt or innocence of the defendant, with the measure of proof applicable in most civil cases, including habeas corpus [citations omitted]" (16a-17a).

Petitioner cites *Poulin* v. *Gunn*, 548 F. 2d 1379 (9th Cir. 1977) and *Vitello* v. *Gaughan*, 544 F. 2d 17 (1st Cir. 1976), in support of his contention that there is a conflict in circuits concerning the *Wainwright* case. *Poulin*, handed down *prior* to *Wainwright*, employs the bypass rule of *Fay* v. *Noia*, *supra*, subsequently abandoned in *Wainwright*. *Vitello* also was decided *prior* to *Wainwright*. Since both circuit cases were rendered *prior* to *Wainwright*, petitioner obviously errs in the contention that there is a present existing conflict.

C.

The Second Circuit in *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333 (1974), reiterated that "the current standard of ineffective assistance of counsel in this circuit is that in order to be of constitutional dimensions, the representation be so 'woefully inadequate' as to shock the conscience of the Court and make the proceedings a farce and mockery of justice' ", quoting *United States* v. *Wight*, 176 F. 2d 376, 379 (2d Cir. 1949). The Court further

observed that errorless counsel is not required and that there must be a "total failure to present the cause of the accused in any fundamental way, *United States* v. *Garguilo, supra*, 374 F. 2d at 796, quoting *Brubaker* v. *Dickson*, 310 F. 2d 30, 39 (9th Cir. 1972), *cert. denied* 372 U.S. 978 (1963)." Examining the facts of the case, the strength of the prosecution's case, and the diligence of defense counsel, it is impossible to deem this a case of ineffective counsel pursuant to Second Circuit standards. See Statement of Case, as well as Second Circuit opinion, 12a-19a.

Petitioner's reference to Mr. Justice Brennan's concurring opinion (actually, the concurrence of Mr. Justice White), endorsing a reasonable competence standard, is neither supported by Justice White's language nor intent.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, September 7, 1977

Respectfully submitted,

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